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No. 94-8729

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1994

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ of Certiorari to
the Michigan Supreme Court

BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

E. E. EDWARDS, III*
1707 Division Street, Suite 100
Nashville, TN 37203-2701
(615) 245-3334

RICHARD J. TROBERMAN
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

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QUESTION PRESENTED FOR REVIEW

1. Whether a wife's interest in a vehicle which she jointly owned with her husband may, consistent with the federal constitution, be abated by a court pursuant to a Michigan abatement statute, where the record established that the wife had no knowledge that the vehicle would be used by her husband in violation of the abatement statute.

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BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia non-profit corporation with a membership of more than 8,800 attorneys and 28,000 affiliate members, including representatives from every state. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL was founded over thirty-five years ago to promote study and research in the field of criminal defense law; to

[1] All parties have consented to the filing of this brief pursuant to Rule 37.3 of the Rules of this Court.

disseminate and to advance knowledge of the law in the field of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers. Among NACDL's stated objectives is the promotion of the proper administration of criminal justice.

NACDL has long been troubled by the expanding use of civil forfeiture proceedings in our criminal justice system. We have deep concerns about the fairness of some of these laws and the aggressive way they are being used by state and federal prosecutors to inflict punishment and to deprive individuals of significant property interests, often without any of the constitutional and procedural protections generally accorded to either criminal or civil defendants. Like the Second Circuit Court of Appeals, we too "continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes." *United States v. All Assets of Statewide Auto Parts, Inc., etc.*, 971 F.2d 896, 905 (2nd Cir. 1992). *See also United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L.Ed.2d 490, 521, n.1., 113 S.Ct. 515, n.1 (1993) (Thomas, J., concurring and dissenting).

In its past three terms, this Court has accepted review of five forfeiture cases.[2] In its decisions, the Court has endeavored to establish legal safeguards to appropriately restrain the government's increasingly aggressive use and abuse of the forfeiture weapon. This case provides the Court with an opportunity to decide a question which it has long reserved: "whether it would comport with due process to forfeit the property of a truly

[2] *Republic National Bank v. United States*, 506 U.S. ___, 121 L.Ed.2d 474, 113 S.Ct. 554 (1992); *United States v. A Parcel of Land (92 Buena Vista Avenue)*, 507 U.S. ___, 122 L.Ed.2d 469, 113 S.Ct. 1126 (1993); *Alexander v. United States*, 509 U.S. ___, 125 L.Ed.2d 441, 113 S.Ct. 2766 (1993); *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993); and *United States v. James Daniel Good Real Property*, 510 U.S. ___, 126 L.Ed.2d 490, 114 S.Ct. 492 (1993).

innocent owner." *Austin v. United States*, 509 U.S. ___, ___, 125 L.Ed.2d 488, 502, n.10, 113 S.Ct. 2801, 2809, n.10 (1993). Thus, NACDL has a vital interest in the outcome of this case, and urges the Court to reverse the decision below.

SUMMARY OF ARGUMENT

Throughout this nation's history, the importance of private property as a "concomitant to liberty" has been widely recognized. This Court's recent decisions have served to clarify and strengthen these property rights which we hold so dear in a free society. However, a large threat looms against these rights in the form of modern day forfeiture statutes driven by strict adherence to ancient principles.

For reasons based not upon considerations of fundamental rights, but upon purely economic or political expediency, forfeiture law has intruded on the rights of innocent owners. Although two seemingly independent lines of forfeiture law have persisted since the founding of the Republic, modern forfeiture jurisprudence tends to follow the line of cases which blindly accepts the notion that it is legally justifiable to forfeit private property, regardless of the culpability of the owner, based upon a legal fiction that has long since out-lived its usefulness. Reviewing the history of forfeiture laws, it is clear that forfeiture jurisprudence can no longer justify its blind adherence to the past, and that based on contemporary notions of justice and fair-play, the forfeiture of a truly innocent owner's property cannot comport with due process of law or the Takings Clause.

ARGUMENT

I. THE PROTECTION OF PRIVATE PROPERTY RIGHTS IS CENTRAL TO OUR HERITAGE.

Throughout the history of western democratic societies, the importance of private property as a "concomitant to liberty" has

been widely recognized. *United States v. $12,390.00*, 956 F.2d 801, 810 (8th Cir. 1992) (Beam, J., dissenting in part). "The Fifth Amendment embodies the Lockean belief that liberty and the right to possess property are an interwoven whole; neither life, liberty, nor property can be arbitrarily or capriciously denied us by government." *Id.* Indeed, this Court has recognized that "a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 92 S.Ct. 1113 (1972); *See* John Locke, THE SECOND TREATISE ON CIVIL GOVERNMENT, ¶ 123-42. Likewise, as recently observed by this Court, "[I]ndividual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. ___, ___, 126 L.Ed.2d 490, 508, 114 S.Ct. 492, 505 (1993); 510 U.S. at ___, 126 L.Ed.2d at 521, 114 S.Ct. at 515 (Thomas, J. concurring and dissenting).

The nature and quality of a citizen's freedom and security relates directly to his ability to own property and to be secure from governmental intrusion therein. "[I]n a free government almost all other rights would become worthless if the government possessed power over the private fortune of every citizen." *Chicago, Burlington & Quincy R.R. v. Chicago*, 166 U.S. 226, 236, 41 L.Ed. 979, 17 S.Ct. 581 (1897); *see also* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964) (asserting that a person's freedom and security depend on his ability to protect his property from irrational government interference); Leonard W. Levy, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION, 276-77 (1988).

Despite the high regard generally bestowed upon property rights in Anglo-American jurisprudence, the use of civil forfeiture proceedings to confiscate private property has had an oppressive history in both England and America, virtually as long as organized self-government. *See, e.g., Laws of Ine*, c. 6

(*circa* 688-695), collected in 1 F. Lieberman, DIE GESETZE DER ANGELSACHSEN 91 (1903). *See generally*, 2 F. Pollack & F. Maitland, THE HISTORY OF ENGLISH LAW, 462-511 (2d ed. 1911); J. Maxeiner, *Bane Of American Forfeiture Law —Banished At Last?*, 62 CORNELL L.R. 768, 770 (1977). Much of this history exhibits a decided indifference, at times even a disdain, for private property rights.

The disrespect for the rights of property owners in forfeiture statutes and court decisions is often concentrated in the legal fiction often referred to as the "personification" doctrine — the notion that an inanimate object may be guilty of an offense and punished therefor without regard to the culpability of those owning an interest in the property. The history of forfeiture demonstrates that this legal fiction is little more than a rationalization for judicial doctrines based not on consideration of fundamental rights, but on policy considerations, usually driven by economic or political factors. This fiction has no sound basis in our legal system and cannot be reconciled with the principles of freedom and security so valued by a free society. *See Boyd v. United States*, 116 U.S. 616, 29 L.Ed.2d 746, 6 S.Ct. 524 (1886).

> [W]e cannot see the force of this distinction [between an action in rem against the property and an action against the owner]; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is to be forfeited.

Id., 116 U.S. at 637.

It is through the use of this legal fiction that "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense." *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 683, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974). However, the Court also observed in that same

case that "it would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property, for in that circumstance it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive. *Cf. Armstrong v. United States*, 364 U.S. 40, 49, 4 L.Ed.2d 1554, 80 S.Ct. 1563 (1960)." *Id.*, 416 U.S. at 689-90.

Indeed, just three years earlier, the Court noted that although its past decisions had recognized that "centuries of history support the . . . claim that forfeiture statutes . . . have an extraordinarily broad scope," *United States v. United States Coin and Currency*, 401 U.S. 715, 719, 28 L.Ed.2d 434, 91 S.Ct. 1041 (1971), before the Court would order a forfeiture, it

> would have to be satisfied that a forfeiture statute, with such a broad sweep, did not raise serious constitutional questions under that portion of the Fifth Amendment which commands that no person shall be "deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." Even Blackstone, who is not known as a biting critic of the English legal tradition, condemned the seizure of the property of the innocent as based upon a "superstition" inherited from the "blind days" of feudalism. And this Court has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment. *See, e.g., Goldsmith v. Grant Co. v. United States* [254 U.S. 505, 65 L.Ed. 376, 41 S.Ct. 189 (1921)].

Id., at 720-21.

In *Austin v. United States*, 509 U.S. ___, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993), this Court reaffirmed that "[T]he more

recent cases have expressly reserved the question whether the fiction could be employed to forfeit the property of a truly innocent owner." *Id.*, 125 L.Ed.2d 502, 502 n.10, 113 S.Ct. 2809, 2809 n.10; 125 L.Ed.2d at 508, 113 S.Ct. at 2814 (Scalia, J., concurring); 125 L.Ed.2d at 510, 113 S.Ct. at 2816 (Kennedy, J., concurring). Because the forfeiture statute at issue in *Austin* exempted "innocent owners" from forfeiture, the Court had "no occasion to decide in this case whether it would comport with due process to forfeit the property of a truly innocent owner." *Id.*, 125 L.Ed.2d 502, n.10, 113 S.Ct. 2809, n.10.

This case presents the Court with the opportunity to finally resolve this question. Unlike the statute before the Court in *Austin*, the Michigan abatement statute under which Petitioner's interest in her automobile was abated does not provide for an innocent owner defense. Indeed, it expressly provides that a property owner's knowledge or consent is not required to be shown under the statute.[3] Moreover, in the case below, the

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[3] The proceeding in the Michigan courts against Petitioner's interest her automobile is correctly viewed as a forfeiture action, not merely as a proceeding to abate a nuisance. Forfeiture has been defined as a "default, fine or penalty." J. Kersey, A New English Dictionary (1702), cited by the Court in *Austin, supra*, 113 S.Ct. at 2808, n.7. The State of Michigan certainly sought to impose a fine or penalty upon Petitioner in this case by taking her interest in her car based upon her husband's alleged misconduct.

Regardless of what the Michigan courts called it, the result was a forfeiture or penalty imposed on Petitioner. As this Court recently noted in *Austin*:

> we have recognized that the forfeiture of contraband itself may be characterized as remedial because it removes dangerous or illegal items from society. *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 364, 79 L.Ed.2d 361, 104 S.Ct. 1099 (1984). The Court, however, previously has rejected government's attempt to extend that reasoning to conveyances used to transport illegal liquor. *See One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 699, 14 L.Ed.2d 170, 85 S.Ct. 1246 (1965). In that case it noted: "There is nothing even remotely criminal in possessing an automobile." *Ibid.*

Michigan Supreme Court assumed, for purposes of its constitutional analysis, that based on the record below, Petitioner "did not have knowledge of or consent to the misuse of [Petitioner's] vehicle, of which she was a co-owner." *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 447 Mich. 719, 740, 527 N.W.2d 483, 493 (1994).

In *Austin*, Justice Kennedy observed that although the history of forfeiture laws might not be determinative of the "constitutional question of whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent," "it would have an important bearing on the outcome." *Austin*, *supra*, 125 L.Ed.2d at 510, 113 S.Ct. at 2816. Accordingly, we begin our analysis with a review of the history of forfeiture laws.

II. THREE TYPES OF FORFEITURES WERE RECOGNIZED UNDER EARLY ENGLISH LAW.

The history of forfeiture reveals a sort of dual personality. One line of cases and statutes protects the rights of property owners, while the other affords no protection even to a blameless owner. Early English law distinguished between three types of forfeiture: (1) forfeiture consequent to attainder; (2) statutory forfeiture; and (3) the law of deodand. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680-84, 40 L.Ed.2d 452, 94 S.Ct. 2080 (1974); Maxeiner, *supra*, at 770-775.

A. Forfeitures Consequent to Attainder.

Forfeiture consequent to attainder was held in disrepute in the American colonies, and generally did not survive our emergence as a free nation. It deprived innocent heirs of their

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Austin v. United States, *supra*, 125 L.Ed.2d at 504-05, 113 S.Ct. at 2811. So too here, there was nothing criminal in Petitioner's ownership of her automobile. There is no discernable difference between the use of a vehicle to transport illegal liquor, and the use of an automobile to transport Petitioner's husband to a location where an act of prostitution allegedly took place.

inheritance, and it, too, often permitted dispensing with judicial determinations of guilt. Maxeiner, *supra*, at 779. The United States Constitution forbade bills of attainder. U.S. Const. art. I. §9, cl. 3. The First Congress abolished forfeiture of estate as a result of a felony conviction. *Calero-Toledo*, *supra*, 416 U.S. at 682-83; see 18 U.S.C. §3563; Re. Stat. §5326 (1874); 1 Stat. 117 (1790).

B. The Law of Deodands.

The deodand was the value of an inanimate object which directly or indirectly caused the accidental death of a subject of the Crown. *Calero-Toledo*, *supra*. The origins of the deodand have been attributed to ancient Hebrew laws. *Id. See, e.g., United States v. One 1963 Cadillac Coupe de Ville*, 260 F.Supp. 185, (W.D. Mo. 1966) (citing Exodus 21:28). The biblical reference is, however, misplaced in one very significant respect. The stoning of the ox in Exodus was not a forfeiture. Neither the animal nor its value was acquired by a sovereign. Stoning was a community action; was the form of punishment reserved for the gravest offenses; and was in no way a religious act. The animal was not sacrificed to God. In fact, no one obtained a pecuniary benefit, since the eating of the animal's flesh was strictly forbidden. The social utility of the Hebrew law was probably to discourage a blood-avenger from the kin of the deceased though the community's act of stoning the animal and to encourage owners to maintain their animals properly. *See* J. Finkelstein, *The Goring Ox: Some Historical Perspectives On Deodands, Forfeitures, Wrongful Death and The Western Notion Of Sovereignty*, 46 TEMPLE L.Q. 169, 180-182 (1973).

In contrast with the law of Exodus, early English kings assumed divine authority to turn accidental death into an opportunity to acquire revenue. As early as 1280, Edward I decreed a statute providing for the procedure by which a coroner's jury was to assess the value of the deodand. The levy was then paid to the King. 3 Law Mag. N.S. 189, n.1 (1845); Finkelstein,

supra, at 182, n.45. "As far back as the record can be traced, the beneficiary of the deodand was *never* the kin of the dead victim, but the King, or the local lord or township designated as beneficiary in the Crown's name." *Id.*, at 182 (emphasis added). The deodand had no charitable purpose. For example, it was imposed even when the instrument causing death belonged to the victim himself. *Id.*

Although the harshness and absurdity of the deodand was frequently criticized,[4] especially after the dawn of the industrial revolution, the law persisted until 1846 when Lord Campbell persuaded Parliament to enact the Deodands Abolition Bill. 9 & 10 Vict. c. 62. The deodands' persistence seems to have been entirely due to the Crown's reluctance to forego a revenue stream. As Lord Campbell stated during the parliamentary debate:

> Not only an ox that gored a man was forfeited, but if a person fell from a horse, the horse was forfeited: and if a man fell from a horse into the water and was carried down a millrace and killed by the wheel of the mill, the horse and the mill wheel were both forfeited.

77 Hansard, PARLIAMENTARY DEBATES 1028 (1845).

By linking the repeal of the deodand with the passage of the Compensation For Accidents Bill (the first English wrongful death statute), repeal was accomplished. *See Calero-Toledo*, *supra*, 416 U.S. at 681, n.19, 94 S.Ct. 2091, n.19. The speech of the Lord Chancellor during the debate provides insight into how such an irrational law could be maintained for so long.

> The system [*i.e.* deodands] which he [Lord Campbell] had dilated on was *pregnant with absurdity* . . . But he [the Lord Chancellor] should . . . suggest one or

[4] In discussing the abolition of the deodand, Lord Campbell remarked that it was a "wonder that a law so extremely absurd and inconvenient should have remained in force . . . especially . . . [as it] was called into action almost weekly." 77 Hansard, PARLIAMENTARY DEBATES 1027.

> two points for consideration . . . The first point was, that deodands formed part of the ordinary revenue of the Crown . . . There was another point . . . [in] that the property of the Crown had been granted out to lords of franchises and public corporations. They possess a property, therefore, in these deodands; their Lordships would hardly interfere with these rights, without providing in some way or other compensation or an equivalent for the loss of it . . .

77 Hansard, PARLIAMENTARY DEBATES 1032 (1845) (emphasis supplied).

Deodands did not become part of the common-law tradition of this country. *Calero-Toledo*, *supra*, 416 U.S. at 682, 94 S.Ct. at 2091; *see Parker-Harris Co. v. Tate*, 135 Tenn. 509, 188 S.W. 54, 55 (1916) ("to the credit of American jurisprudence" a doctrine so repugnant to our concept of justice was not included in our common law). Our forfeiture laws, however, have been analogized to the law of deodand. *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 510, 65 L.Ed. 376, 41 S.Ct. 189 (1921); *Austin v. United States*, *supra*, 125 L.Ed.2d at 501, 113 S.Ct. at 2809. For such an absurd and unjust law to survive for centuries despite widespread recognition of its "absurdity" attests to the difficulty of reform when economic interests lie with the government to defend its existence.[5] The true analogy in the present context is not how much modern forfeiture statutes derive from the deodand, but whether the "absurdity" of a modern statute which fails to protect an innocent owner can be allowed to survive long past any economic or social utility.

[5] Many of the same root causes for the lack of reform of forfeiture laws persist today. As this Court recently observed in *James Daniel Good Real Property*, *supra*, "the government has a direct pecuniary interest in the outcome of the proceeding." *Id.*, 126 L.Ed.2d at 504, 114 S.Ct. at 502.

C. Statutory Forfeitures.

The third type of English forfeiture laws were utilized by the Crown during the colonial period and maintained as a major revenue source by the new federal government.[6] These were statutes providing for forfeiture of goods and instrumentalities used in violation of a multitude of customs and revenue laws. *See, e.g.*, 8 Anne, c. 7, §17 (providing for forfeiture of vessels, horses, carriages, and the like used to move uncustomed goods); 12 Car. 2, c. 4 (the Navigation Act, which was broad-reaching, but included forfeiture of vessels and cargo). These cases, if involving a seizure on land, came to be heard before a jury in the Court of Exchequer, one of the three great common law courts. *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 137, 87 L.Ed. 663, 63 S.Ct. 499 (1943).

It is unclear when the Exchequer began to assert *in rem* jurisdiction over forfeitures. Maxeiner, *supra*, at 775, n.46. However, Blackstone surmised that extending jurisdiction to goods seized was logical and practical when the owner was unknown or did not appear to claim the seized property. 3 W. Blackstone, COMMENTARIES *262. The Exchequer was, after all, the court with jurisdiction over all matters "touch[ing] the [Crown's] profit." *The Attorney- General v. Hallett*, 15 M & W 97, 153 Eng. Rep. 777 (Ex. 1846). In *Hallett*, it was held that "where the King's revenue is concerned . . . , [the case] shall be removed from any other Court where the action is brought, into the Offices of Pleas of the Exchequer." *Id.*, at 103, 153 Eng. Rep. at 779.

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[6] George Fishman, assistant counsel to the House Judiciary Committee writes that customs duties constituted more than eighty per cent of all federal revenues during the early years of the republic. Thus, all branches of the young federal government, including the judiciary, had a vital interest in applying doctrines which aided the collection of these revenues. Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 NEW YORK L.S.L.R. 121, 122-23 (1994).

From early cases, one writer has deduced that property was subject to forfeiture only after an owner appeared and confessed the conduct giving rise to forfeiture or a verdict was returned against him. *See* Maxeiner, *supra*, at 775 and n.47, citing *The Case of Shipping Wools to Calais*, Select Cases in the Exchequer Chamber [Case 31], 144 (1958) (Seldon Society, Vol. 51, 1933) (a case "upon the statute which allows no one to ship wool, etc., except to Calais; and if any shall do this, he shall loose double the value; and further by the same statute he who shall inform against him, shall have a third, after [the offender] is duly attained or confesses this in a court of record"). The early case of *Roe v. Roe*, Hardres 185, 145 Eng. Rep. 443 (Ex. 1661), seemingly supports this view. *Roe* held that, in a suit *qui tam*[7] for "importing to be sold foreign woolen [goods]," in violation of a statute, it was immaterial at trial whether "there be such a statute or no," for the issue "to be tried by the jury is, whether such cloth was imported to be sold." *Id.* Thus, the intent of the owner was clearly viewed as a vital issue.

The history of statutory forfeitures in England from the Middle Ages until the last half of the seventeenth century reflects the struggle between the Crown and the emerging merchant middle class. The battles were fought both in the Court of Exchequer and in the Parliament. The Crown sought to impose vicarious liability upon property owners (or as it was described, to exclude privity as an issue) because "statutory forfeitures were the principal means of tax enforcement." Maxeiner, *supra*, at 773. For example, in the fourteenth century Edward III was able to expand the definition of an attained's property (for forfeiture consequent to attainder) to include goods held as bailee. *See* T. Plucknett, A CONCISE HISTORY OF THE

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[7] An action *qui tam* was brought by an individual suing for himself and the Crown. Such cases occurred frequently and were sometimes known as an informer's suit. Maxeiner, *supra*, at 775, n.45, citing 1 M. Bacon, A NEW ABRIDGEMENT OF THE LAW, ACTIONS *QUI TAM*, 61 (6th ed. London 1807).

COMMON LAW, 474 (5th ed. 1956) and Maxeiner, *supra*. The Crown's efforts were somewhat thwarted, however, by enactment of the Statute of Staples in 1353. 27 Edw. 3, c. 19, 1 Stat. at Large 281 (1353). That statute provided:

> No merchant or other, of what condition that he be, shall lose or forfeit his goods or merchandises, for the trespass and forfeiture of his servant; unless he do it by the commandment or procurement of his master, or that he shall have offended in the office in which his master hath set him, or in other manner that the master be holden to answer for the deed of his servant by the law merchant, as elsewhere is used.

Id., (translation from *Mitchell, who Prosecutes for the King and Himself v. Torup*, Parker 227, 145 Eng. Rep. 764 (Ex. 1766). This statute apparently served to provide an innocent owner defense to many statutory forfeitures relating to commerce on land, until the passage of the Navigation Act under the realm of Charles II in 1660. 12 Car. 2, c. 18, *et seq.*, 1 Stat. at Large 182 (1660).

The Statute of Staples was not an isolated act of Parliament protecting innocent owners from forfeitures. For example, a fourteenth century law of the town of Cork provided for the forfeiture of any shipload of corn which was secretly unloaded and sold without going before a town bailiff "to make recognize of their covenants." 2 *Borough Customs* 174 (Seldon Society Vol. 21 (1906). The law provided for "forfeiture of all the corn thus unloaded, in such a way that the buyer shall suffer the forfeiture, and money to the value of the forfeiture shall be levied from the buyer's goods and paid to the foreign seller, and the forfeited corn shall be divided among the citizen neighbors . . ." *Id.* (translation in volume cited). Thus, only the offending party (the buyer who secretly unloaded the goods) suffered from the forfeiture.

Even more significant was the passage, ten years after the Statute of Staples, of an innocent owner provision protecting ship owners, which provided

> Whereas the Ships of divers People of the Realm be arrested and holden forfeit, because of a little Thing put in their Ship not customed, whereof the Owners of the same Ships be ignorant; it is accorded and assented, That no Owner shall lose his Ship from the fifteenth day of February next coming forth, for such a small Thing put within the Ship not customed, without his Knowledge.

37 Edw. 3, c. 8, 1 Stat at Large 319 (1363).

D. The Dual Personality of Forfeitures Becomes Manifest.

After three centuries of providing a substantial measure of protection to property owners operating in commerce, the stage was set for roughly 150 years of conflict and contradictory decisions. The "dual personality" of forfeiture, described above, became clearly manifest. The move toward complete vicarious liability of owners — removing privity of owners as an issue — was driven by two forces: the political policy of England following mercantile economic theories by enacting protectionist statute after statute to create exclusive colonial markets and exclusive trade routes for British ships; and the judicial view that customs revenues, the primary source of income to the Crown, could not be collected if judicial action were required to be taken directly against ship owners. The latter view was clearly transported to the colonies and later adopted by federal courts of the United States. *See, e.g., The Palmyra*, 12 Wheat. 1, 6 L.Ed. 531 (1827) (conviction for piracy not prerequisite to forfeiture of boat); *United States v. Brig Malek Adhel*, 2 How. 210, 238, 11 L.ed. 239 (1844) (vessel "treated as the offender" without regard to owner's conduct "as *the only adequate means* of suppressing the offense or wrong,

or insuring an indemnity to the injured party") (emphasis supplied).

This trend, however, represented but one path taken by forfeiture proceedings in England, and later in the United States. A second clearly defined path demonstrated resistance both in the English Courts and in Parliament to ignoring private property rights. The tendency of early American decisions to follow the first path was merely an expression of economic necessity as perceived by federal courts during the nation's first century.

Sheppard v. Gosnold, Vaughan 159, 124 Eng. Rep. 1018 (C.P. 1673) was an action in trespass by the lord of Bawdsey Manor for damages resulting from the seizure by the King's officers of a load of wax on which the fee ("poundage") had not been paid. The plaintiff contended that the wax had been lost off a ship at sea and drifted ashore and no poundage was therefore due. The court construed the issue as whether wreckage was to be considered the same as imported merchandise for which Parliament had provided poundage must be paid. *Id.*, at 164, 124 Eng. Rep. at 1020. Holding for the plaintiff, the court refused to apply a legal fiction that the property had offended, stating:[8]

> And goods brought or imported any where as merchandise . . . to be sold, must necessarily have an owner to set and receive the price for which they are sold, unless a man say, that goods can sell themselves, and set and receive their own prices.
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> But wreck goods imported or brought anywhere, have no owner to sell or prize them at the time of their importation, and therefore are not brought by way of or as merchandise to England . . .

[8] In 1866 this Court in *Boyd v. United States*, *supra*, quoted the now famous words from *Sheppard*: "Goods as goods . . ." 116 U.S. 616, 637 (1886).

> Secondly, though in a loose sense, inanimate objects are said to bring things; as, in certain seasons, rain to bring grass . . . Yet, when the bringing in or importing, . . . hath reference to acts of deliberation and purpose, as of goods for sale, which must be done by a rational agent . . .
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> [W]recked goods are no goods imported within the intention of the Act, and consequently not to answer the King's duties; for goods, as goods, cannot offend, forfeit, unlade, pay duties, or the like, but men whose goods they are.

Id., Vaughan, at 171-72, 124 Eng. Rep. at 1023-24.

Only a few years earlier, Parliament had passed the Navigation Act, the broadest of the forfeiture statutes, as a major component of English policy to promote national seapower. 12 Car. 2, c. 18, 1 Stat. at Large 182 (1660); *see* Maxeiner, *supra*, at 774. The Navigation Acts were enacted "for the increase of shipping and encouragement of the navigation of this nation . . ." 12 Car. 2, c. 18, §1. Two years later, Parliament passed a customs frauds act "forasmuch as it appears that several unlawful and indirect means and devices are daily put in practise to export and import goods . . . prohibited by the Laws and Statutes of this Kingdom, as also to defraud the King's most excellent Majesty of his dues, customs, and subsidies . . . 13 and 14 Car. 2, c. 11, §1, 1 Stat. at Large 236 (1662). Both statutes contained broad forfeiture provisions without regard to the owner's conduct. Preambles such as these, emphasizing the necessity of the harsh provisions contained therein in order to secure compliance and enforcement of customs laws, were common during this period.

In 1776 came the significant opinion of the Court of Exchequer in *Mitchell v. Torup, supra*. In *Mitchell*, an informer

sought the forfeiture of the ship "Crokery" because its crew had offloaded 221 pounds of tea which had been taken on board by crew members in Norway. Bringing the tea into England violated §4 of the Navigation Act. 12 Car. 2, c. 18.[9] The jury returned a special verdict finding that the tea was smuggled into England by the crew members without "knowledge, privity or consent by the master, mate or owner's" of the vessel. *Id.*, Parker at 228-29, 145 Eng. Rep. at 765. Nevertheless, the court declared the ship forfeit, explaining:

> These words [of the statute] . . . are negative, absolute, and prohibitory; they not only operate upon the goods, but equally on the ship; and there is not a syllable that hints at the privity or consent of the master, mate or owners.
>
> The reasons of penning this clause in these strong terms is to prevent as much as possible its being evaded, for if the privity or consent of the master, mate or owners had been made necessary to the forfeiture, it would have opened a door for perpetual evasion, and the provisions of this excellent act for the increase of the navigation would have been defeated.

Id., Parker at 232-33, 145 Eng. Rep. at 766. Clearly, the British government believed that removing the owner's conduct and knowledge as an issue in forfeiture cases was necessary for the sound enforcement of customs statutes. The court held that the jury's finding of the owner's lack of knowledge was "negatory and void because it is not comprised in the issue." *Id.*, Parker at 236, 145 Eng. Rep. at 767. The court declined to apply the statute of 38 Edw. 3, c. 8, because "the Navigation Act is subsequent . . . and has altered the law by excluding privity, as the most effectual means to prevent the mischief." *Id.*, Parker at 237, 145 Eng. Rep. at 767.

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[9] The court incorrectly cites the statute. It is c. 18, §4, not c. 4 as cited. *Mitchell, supra*, Parker 227, 145 Eng. Rep. at 764.

Since a statutory forfeiture was at issue, the court's reference to instances where the law of deodand caused forfeiture without regard to the owner's innocence is, at best, curious. "[W]here a murder is committed with the sword of an innocent man, the sword is forfeited; the like of all deodands." *Id.*, Parker at 235, 145 Eng. Rep. at 767. Clearly, the court was stretching by its reference to deodands, since the reference did nothing to support the court's turning away from the statute of Edward III, which only provided a defense to statutory forfeiture.[10] The court also refused to follow *Sheppard v. Gosnold*, *supra*, yet failed to distinguish it, or even address its analysis. In short, for such a seminal decision, the Exchequer's reasoning in *Mitchell* was shallow, and the opinion ill-written. At its core, what emerges is the court's candid, but unsupported, belief that absolute vicarious liability of owners is necessary to prevent wholesale evasion of the statute and its revenue production.

The only concession offered by the court in *Mitchell* was the suggestion that the jury "neither would nor ought" to find forfeiture in cases where the quantity of tea was very small. *Id.*, Parker at 237-38, 145 Eng. Rep. 767, citing *Idle qui tam v. Vanheck*, Bunbury 230, 145 Eng. Rep. 657 (Ex. 1727) (where mariners or passengers brought a "small parcel" of uncustomed goods on board, "it would be hard the ship should be forfeited").

It is inaccurate to suggest that *Mitchell v. Torup* is anything more than a landmark on but one of the two paths that English forfeiture law began to take after the 1660 enactment of the Navigation Act. The duality of paths may be confusing, but it nevertheless persists. In 1692, the 4th of William and Mary, Parliament enacted c. 8, the statute cited by the court in *Mitchell*. It was entitled "An Act for Encouraging the Apprehending of

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[10] The court also wrongly cited the 4th of William and Mary, c. 8, as allowing the forfeiture of an innocent owner's horse if used to commit a robbery. In fact, as discussed *infra* at pp. 19-20, it provided just the contrary.

Highwaymen." 4 W & M, c. 8, 1 Stat. at Large 517 (1692). The statute began:

> Whereas the Highways and Roads within the Kingdom . . . have been of late time more infested with Thieves and Robbers than formerly, for want of due and sufficient encouragement given, and Means used, for the Discovery and Apprehension of such Offenders . . .

Id., §1. The statute provided a reward of forty pounds for anyone apprehending a robber who was later convicted. In §6, the statute allowed that such a person

> "shall have and enjoy to his . . . proper Use and Behoof the horse, furniture, arms, money or other goods of the said robber . . . Provided, always, That This Clause . . . shall not be construed to extend to take away the *right* of any person or persons to such horses, furniture and arms, money or other goods, from whom the same were before feloniously taken.

Id., §6 (emphasis supplied). This statute is of signal import for three reasons. First, it was wrongly cited in *Mitchell v. Torup* as supporting the Exchequer's holding in that case. Indeed, it is contra. Second, it provides evidence that the line of statutes and decisions respecting property rights was still in tact, even after the Navigation Act, where protection of customs revenues was not a foremost consideration. Finally, the statute strongly suggests that Parliament was acknowledging a *right* existing in an innocent owner to secure the return of property otherwise subject to forfeiture.[11]

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[11] This statute seems to have gone unnoticed in the many analyses over the past 300 years, probably because it was wrongly cited in *Mitchell*, but, for the reasons stated herein, its significance seems striking.

III. FORFEITURE LAW IN THE UNITED STATES.

The usual forfeiture proceeding in the federal courts in the early years of the republic was *in rem*, since federal forfeiture statutes were largely patterned on the English navigation and customs statutes, violations of which were cognizable in the Exchequer. However, American judges were even more reluctant than their English counterparts to impose liability in the absence of fault. For example, necessity was a good plea to violations of the embargo acts. *See, e.g., Brig Struggle v. United States*, 13 U.S. (9 Cranch) 71 (1815). Other forfeiture statutes were strictly construed so as to avoid imposing liability for blameless acts. *See, e.g., United States v. The Penelope*, 27 F. Cas. 486 (D.Pa. 1806). *See generally*, Maxeiner, at 780-81.

Nevertheless, with the birth of the new republic, federal courts tended to accept the view of the "revenue branch" of English forfeiture jurisprudence. The legal fiction of considering "the thing" as the "offender" was utilized in tacit recognition that the young nation could not otherwise reach business concerns and ship owners in England and on mainland Europe. *The Palmyra*, *supra*, 25 U.S. (12 Wheat.) 1, 15 (1827). Indeed, Justice Story described the motive of economic necessity which drove this Court's early forfeiture decisions. Speaking for the Court in *Brig Malek Adhel*, *supra*, Justice Story stated:

> The vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner . . .
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> * * *
>
> It is not an uncommon course in the admiralty . . . to treat the vessel . . . as the offender . . . *And this is done from the necessity* of the case, as the only adequate means of suppressing the offense or wrong, or insuring an indemnity of the injured party.

Id., 43 U.S. (2 How.) at 233 (emphasis supplied).

In Dobbins Distillery v. United States, 96 U.S. 395, 24 L.Ed.2d 637 (1877) the Court observed that

> Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.
>
> Cases often arise where the property of the owner is forfeited on account of the fraud, neglect or misconduct of those intrusted with its possession, care, and custody, even when the owner is otherwise without fault . . .

Id., 96 U.S. at 401.

The "dual personality" of forfeiture persisted, however, with this Court's decision in *Boyd v. United States*, *supra*, decided just nine years after *Dobbins Distillery*. Quoting *Sheppard v. Gosnold*, *supra*, the Court expressly rejected the legal fiction of the property as the offender. *Id.*, 116 U.S. at 637. The *Boyd* Court held that it could not assent "to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods." *Id.*

Following the apparent rejection of the personification doctrine in *Boyd*, the Court revisited the issue in *J.W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 65 L.Ed.2d 376, 41 S.Ct. 189 (1921). Despite the two independent lines of cases, the Court, albeit somewhat reluctantly, found itself constrained by precedent to follow the personification fiction. If the case were the first of its kind, it and its apparent paradoxes might compel a lengthy discussion to harmonize the section with the

accepted tests of human conduct. Its words taken literally forfeit property illicitly used though the owner of it did not participate in or have knowledge of the illicit use. There is strength, therefore, in the contention that if such be the inevitable meaning of the section, it seems to violate that justice which should be the foundation of the due process of law required by the Constitution.

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> * * *
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> In breaches of revenue provisions, some forms of property are facilities, and therefore it may be said, that Congress interposes the care and responsibility of their owners in aid of the prohibitions of the law and its punitive provisions, by ascribing to the property a certain personality, a power of complicity and guilt in the wrong. In such case there is some analogy to the law of deodand by which a personal chattel that was the immediate cause of the death of any reasonable creature was forfeited.
>
> * * *
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> But whether the reason for section 3450 be artificial or real, it is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.

Id., 254 U.S. at 510-11.

It is not surprising, therefore, that just five years later, the Court in *Van Oster v. Kansas*, 272 U.S. 465, 71 L.Ed. 354, 47 S.Ct. 133 (1926) denied a constitutional challenge to a Kansas statute that provided that a vehicle used in the transportation of intoxicating liquor is subject to seizure and forfeiture. The Court noted that

> it has long been settled that statutory forfeitures of property intrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the Fifth Amendment.

Id., 272 U.S. at 468. The Court held that so long as a property owner consented to the use of his property by another, the property could be constitutionally forfeited even if the owner did not consent to the unlawful use and had no knowledge of such unlawful use. The Court did, however, reserve the question if the same would hold true if the property had been taken without the owner's consent. *Id.*, 272 U.S. at 467.

More recently, this Court recognized that "The fictions of *in rem* forfeiture were developed primarily to expand the reach of the courts." *Republic National Bank of Miami v. United States*, 506 U.S. ___, ___, 121 L.Ed.2d 474, 113 S.Ct. 554, 559 (1992).

That brings us full circle back to *Austin*, where this Court declined to decide the issue now before the Court. The Court in *Austin* did, however, make clear that all of its precedents upholding the forfeiture of an innocent owner's property involved a penalty for negligence. Thus, the Court held that because most civil forfeitures are a form of punishment, they are limited in their severity by the Eighth Amendment Excessive Fines Clause.[12]

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[12] One must query, in light of this Court's holding in *Austin*, how the forfeiture of an innocent person's property cannot be excessive under Eighth Amendment analysis.

In sum, the history of forfeiture laws demonstrates that one line of authority, dating to the realm of Edward III, recognizes the right of a private owner of property who has not engaged in misconduct and who has no knowledge of misconduct by others in lawful possession of the property, to resist a forfeiture. The English Parliament once actually referred to this as a "right," suggesting due process implications. 4 W & M, c. 8, 1 Stat at Large 517 (1692). To be sure, another line of authority fails to support this contention. But the other line of authority relies upon a legal fiction which is inimical to valued constitutional rights protecting private ownership of property and due process as well. The economic necessities for protecting means of revenue which gave birth to this pernicious fiction are long since dead. It is time for this Court to lay to rest the fiction itself.

IV. A FORFEITURE PROCEEDING WHICH PUNISHES AN INDIVIDUAL WITHOUT REGARD TO WRONG-DOING CANNOT COMPORT WITH MODERN DAY NOTIONS OF JUSTICE AND FAIR PLAY.

It is clear from the above review of the history of forfeiture laws that the early justification for the "personification" doctrine, and the harsh results it visited upon innocent property owners are no longer relevant in a modern society which places such a high value on the right to own property. As Justice Holmes so powerfully stated:

> It is revolting to have no better reason for a rule than that it was laid down at the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 469 (1897).[13] Now that this Court has recognized that civil forfeiture is

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[13] The Court in *Goldsmith-Grant Co. v. United States*, *supra*, would have done well to heed Holmes' advice. Almost three-quarters of a century

punishment, *Austin*, *supra*, it is inconsistent with substantive due process and the Fifth Amendment Takings Clause to impose such punishment on a truly innocent owner.[14] Nor has the practice of forfeiting the property of innocent owners gone unchallenged by legal scholars. Dozens of articles and commentaries severely criticize the practice.[15]

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ago, this Court in *Goldsmith* clearly recognized that the application of a forfeiture statute to an owner who "did not participate in or have knowledge of the illicit use" of his property "seems to violate that justice which should be the foundation of the due process of law required by the Constitution." *Id.*, 254 U.S. at 510. Nevertheless, the Court found the "apparent paradoxes" created by the statute were "too firmly fixed in the punitive and remedial jurisprudence to be now displaced." *Id.*, 254 U.S. at 511.

[14] House Judiciary Chairman Henry Hyde (R-Ill) documents some of the harsh results forfeiture has visited upon innocent owners in his recent publication, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?, (CATO 1995).

[15] In addition to the materials cited in the text, other articles condemning the practice of forfeiting the property of innocent owners include the following: Michael Goldsmith and Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 Duke L.J. 1254; Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 Univ. of Miami L.Rev. 911; 1994 Symposium: What Price Civil Forfeiture? Constitutional Implication and Reform Initiatives, Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 New York L.Sch.L.R. 1; 1994 Symposium: What Price Civil Forfeiture? Constitutional Implication and Reform Initiatives, Steven L. Kessler, *For Want of Nail: Forfeiture and the Bill of Rights*, 39 New York L.Sch.L.R. 205; Anthony J. Franze, *Casualties of War?: Drugs, Civil Forfeiture and the Plight of the Innocent Owner*, 70 Notre Dame L.Rev. 369; Arthur G. Crabtree, *Seizure of Third Party's Property Associated With Drug Money: Requiring Third Parties To Become Private Police?*, 23 Sw. U. L. Rev. 79; Gordon Chang, *Supreme Court Upholds Forfeiture of Innocent Owner's Property Without Prior Notice and Hearing*, 60 Cornell L. Rev. 467.

V. A NEGLIGENCE STANDARD CANNOT BE FAIRLY APPLIED TO PETITIONER AS A CO-OWNER.

This Court stressed in *Austin*, *supra*, that forfeitures are justified "on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence." However, in the case at bar, Petitioner cannot fairly be deemed to have been negligent in allowing her property to have been used by her husband to engage in an act of prostitution. As co-owner of the vehicle, Petitioner's husband had an independent right to use the vehicle. Indeed, it is doubtful if Petitioner could have done anything to prevent her husband's use of the vehicle under Michigan property law. Thus, it is clear that Petitioner had "done all that could reasonably be expected to prevent the proscribed use of the property." *See Calero-Toledo*, *supra*, 416 U.S. at 689. *See, e.g.*, *United States v. One 1977 Cherokee Jeep*, 639 F.2d 212, 213 (5th Cir. 1981); *United States v. Real Property Known as 6109 Grugg Road*, 886 F.2d 618, 627 (3rd Cir. 1989). Consequently, it "would be difficult to reject [Petitioner's] constitutional claim," *id.*, in this case.

Moreover, we respectfully submit that the appropriate test of innocent ownership should focus exclusively on a two-prong test: (1) Was the owner innocent of any misconduct with respect to the illegal use of property; and (2) Did the owner know of (or reasonably should have known of) the illegal use of the property and, if so, did the owner consent to the unlawful use? The social and commercial consequences of a pure negligence test are, as recent court decisions have shown, far-reaching and harmful. The better approach is to require knowledge before a duty is imposed.

> [W]hen governing decisions are unworkable or are badly reasoned, "this Court has never felt constrained to follow precedent." *Smith v. Allwright*, 321 U.S.

> 649, 665, 88 L.Ed. 987, 64 S.Ct. 757. Stare decisis is not an inexorable command; rather it "is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119, 84 L.Ed. 604, 60 S.Ct. 444 (1940). This is *particularly true in constitutional cases*, because in such cases "correction through legislative action is practically impossible." *Burnett v. Coronado Oil & Gas Co.*, *supra*, at 407, 76 L.Ed. 815, 52 S.Ct. 443 (Brandeis, J. dissenting).

Payne v. Tennessee, 501 U.S. ___, ___, 115 L.Ed.2d 720, 737, 111 S.Ct. 2597, 2600, (1991) (emphasis supplied).

CONCLUSION

For the foregoing reasons, NACDL as amicus curiae respectfully urges this Court to reverse the decision of the Michigan Supreme Court, and to hold that the forfeiture of Petitioner's interest in her vehicle violated Petitioner's right to due process of law and constituted an unlawful taking in violation of the Fifth Amendment Takings Clause.

Respectfully submitted,

E. E. EDWARDS, III*
1707 Division Street, Suite 100
Nashville, TN 37203-2701
(615) 245-3334

RICHARD J. TROBERMAN
1301 Fifth Avenue, Suite 3500
Seattle, WA 98101-2650
(206) 343-1111

*Counsel of Record for
Amicus Curiae
National Association of
Criminal Defense Lawyers

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